IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03/09/2002

CORAM

The Honourable Mr.Justice A.S.VENKATACHALAMOORTHY
and
The Honourble Mr.Justice A.K.RAJAN

Appeal Suit No.1061 of 1986
and
Two Cross Objections

Appeal Suit No.1061 of 1986

Chandrakumar @ Seeni Chettiar .. Appellant

-Vs-

1. Sethuraman Chettiar
2. Subramanian Chettiar
3. Seethalazmi
4. Saraswathi
5. Dhanalaxmi
6. Meenakshi
7. Palaniammal .. Respondents

Cross Objection No.1:

1. Seethalakshmi
2. Saraswathi
3. Dhanalaxmi .. Cross Objector

v.
1. Chandrakumar
@ Seeni Chettiar
2. Subramanian Chettiar
3. Meenakshi
4. Palaniammal .. Respondents

Cross Objection No.2:

1. Subramanian Chettiar
2. Palaniammal .. Cross Objectors

v.

1. Chandrakumar &
Seeni Chettiar

2. Sethuraman Chettiar
3. Seethalakshmi
4. Saraswathi
5. Dhanalakshmi
6. Meenakshi .. Respondents

The Appeal and the Cross-Objections are filed against the judgment dated 4.4.1986 in O.S.No.63 of 1983 passed by the Subordinate Judge, Ramanathapuram at Madurai.

!For Appellant : Mr.T.T.Ravichandran

^For Respondent : Mr.S.Gopalratnam (R1)
Mr.P.R.Balasubramaniam (R2 to R7)
J.Anandavalli for
Mr.P.Ananthakrishna Nair
R6- Notice dispensed with.

:J U D G M E N T

A.K.RAJAN.J

First defendant is the appellant.
2. The appeal is against the decree in the suit for partition passed by the Subordinate Court,Ramnad. The parties are referred to as plaintiff and defendants for the sake of convenience.

3. The case of the plaintiff is as follows: The plaintiff and defendants 1 and 2 are the sons and defendants 3 to 6 are the daughters; 7th and 8th defendants are the wives of late Chandrakumar Chettiar. The suit properties are joint family properties of late Chandrakumar Chettiar; he died in the year 1962. The first defendant is the eldest son and therefore, he was acting as the Manager of the Joint family. The family was running their traditional business in oil. The business of the plaintiff's father was continued by his sons. The income from the joint family properties as well as from the ancestral trade and business yielded surplus and from and out of the surplus funds, items 2 and 3 of 'A' Schedule properties were purchased. Item No.3 was already in possession of the family under othi dated 11.9.1956 taken by the plaintiff's father. Item No.2 of 'A' schedule was purchased in the year 1964 and item No. 3 of 'A' schedule property was purchased in the year 1965. Items 7 to 21 of 'A' schedule were landed properties managed by the first defendant. All these properties are joint family properties. For the purpose of convenience, the plaintiff and the second defendant are cultivating some lands and living separately from 1971-72. 'B' schedule properties are movable properties of the joint family. The plaintiff demanded partition of the properties. But the first defendant was not agreeing. Hence, the suit for partition.

4. The first defendant in his written statement has stated as follows: The relationship of the parties are admitted. The father of the first defendant died on 10.8.1962. After that by mutual arrangement and on advice of some panchayatdars, item 1 of 'A' schedule was divided between the plaintiff and defendants 1 and 2 and they are in separate possession from that date onwards. Further in the year 1967,there was an oral partition as family arrangement by which items 4,5 and 6 of 'A' schedule was allotted to the first defendant. Thereafter, he has been paying tax in his own name. Item 6 is the place of business given to the first defendant. The oil business exclusively belongs to him. It is not correct to say that he was continuing the business of his father. His father was carrying on business at a different place which was taken on lease by his father on 19.10.1961. After his death, the plaintiff took all the assets of oil business to the place where he is now carrying on the oil business. Item No.3.is a separate property of the first defendant which was purchased by him on 2.8.1965 from his own funds from N.Raman Chettiar and by obtaining loan from a bank on 23.11.1981. He has been paying property tax in his own name from the date of purchase. As regards item No.7 to 27, though not all of them are ancestral properties, they were divided between the plaintiff and defendants 1 and 2. Items 1,4,8 and 20 and half of item NO.10 were given to the plaintiff ; the first defendant got items 1,3 and 19; the second defendant got items 1,2,14 & 15; A portion of Item 16 was allotted to the first defendant and the remaining portion was allotted to the plaintiff. Defendants 3 to 8 were given the sale proceeds of Rs.7,000/- in full quit. The first defendant was doing his business independently and not as a Manager of the joint family. Therefore, the plaintiff is not entitled to any relief as prayed for and hence, the suit is liable to be dismissed.

5. Further, in his additional written statement he has stated that the newly added item is not a joint family property and that all the divisible properties were divided by mutual arrangement with the help of some Panchayatdars and the newly added item was also divided among the three brothers; that in the portion allotted to this defendant there is a tamarind tree and vagai tree; that in the Southern side there are kattu Karuvela trees and he had put a thatched house in his portion.

6. Defendants 2 and 8 have filed a written statement in which it has been stated as follows: It is not correct to allege that the suit properties are ancestral properties of joint family consisting of the plaintiff and his brothers. The plaintiff and the first defendant are living separately from 1972-73 . Second defendant was living separately even from 25.4.1967. He is earning separately and he is not enjoying the income of the properties of the joint family properties. During the lifetime of the grand father the family was not possessed of adequate properties so as to get sufficient income and nucleus to acquire properties. But, at the time of the death of grand father, there were only a residential house and a small vacant site which are items 4 and 6 of 'A' schedule properties and the other items were purchased by the father from and out of his own earnings unconnected with and independent of the the aforesaid ancestral properties. The grand father of the plaintiff died when the plaintiff's father was very young and the father of the plaintiff along with plaintiff and defendants 1 and 2, acquired properties from out of his own earnings. As there was no income from the ancestral properties, the oil business was conducted by the father out of his

own efforts. It was not a business continued from the grand father's time. Items 2 and 3 of the ' A' schedule properties were purchased in the name of the first defendant out of the income of the joint family properties as manager of the joint family consisting of the plaintiff and the defendants. They are not the ancestral properties. Similarly, items 3 and 5 were purchased by the father of the plaintiff and the items 9 to 11 were purchased in the name of the first defendant in the capacity of the manager of the joint family. Items 7,8, and 12 to 21 of 'A' schedule were purchased by the father of the plaintiff and the defendants 1 and 2 as his self acquisition. The suit as framed is not maintainable and as such the plaintiff is not entitled to the reliefs as claimed and therefore, the suit must be dismissed with costs.
7. Further, in their additional written statement, they have stated that the plaintiff is not entitled to the site mentioned in items no.28 in 'A' schedule . No patta was issued in the name of the alleged purchaser. The 2/3rd portion of the entire area mentioned in the sale deed was shown and classified as puramboke. This defendant has obtained patta in his individual name for the 1 /3rd share of the property and he has been in possession and enjoyment of the above said house sit for over a statutory period and as such the plaintiff cannot claim any share in the said item. The inclusion of the above said item is with ulterior motive of depriving this defendant of his absolute right over the said item. The plaintiff and the first defendant are liable to render true and proper account to this defendant in respect of his share .
8. The defendants 3 and 4 in their written statement has stated that it is not correct to say that 'A' and 'B' schedule properties are the ancestral and joint family properties of the plaintiff, defendants 1 and 2 and their father. The properties mentioned in the 'A' Schedule except item 4,5, and 6 , are self acquired properties. Items 2 and 3 of 'A' Schedule properties were purchased by the first defendant from and out of the income of his father and not from the ancestral nucleus so as to purchase other properties. Hence, the suit is liable to be dismissed.

9. On these pleadings issues were framed and parties went for trial. The plaintiff, examined as P.W.1, has stated that his father was carrying on the family business in oil; he and his brothers were assisting him in the business; he died in August 1962; even after his death, the ancestral business is continued; the first defendant as the eldest member of the family was managing the business; the first defendant is continuing the business in the same place where his father was carrying on the business(in item 6 of the 'A' Schedule properties);first defendant is living separately only after 1971; in the cross examination, he has reiterated that after the death of his father, all the brothers were carrying on the business in the same place.

10.The first defendant, examined as D.W.1, has admitted in his evidence that his father was carrying on oil business in item 6 of 'A' schedule property and after his death, he is carrying on the business. But he has stated that he was carrying on the business as a separate business and not as a manager of the joint family. In cross examination, he has stated that in the year 1964, he had separate licence in his name for running the oil

business. He denies the suggestion that after the death of his father, the licence standing in the name of the father was changed into his name and he was carrying on the business as the manager of the joint family. He has also admitted that in the year 1964, there was no partition; but he has separated himself from the joint family. He also admits that the properties which were inherited by the father from grand father was not yielding any income.

11. The second defendant,examined as D.W.3, has stated that the first defendant was carrying on his father's business and he continues the business after the death of his father. Further in cross examination he has stated that the first respondent is carrying on the business in the same place where his father was doing the business. Third defendant, D.W.4, has also stated that his father was carrying on oil business and the properties were purchased by his father.

12. The plaintiff marked Exs.P1 to P.57. On the side of the defendants witnesses were examined and Exs.D1 to D.104 were marked. On the above said pleadings and evidence, the trial Court accepted the case of the plaintiff and decreed the suit as prayed for with respect to "A" schedule properties, but dismissed the suit with reference to "B" schedule properties. Aggrieved by the said judgment and decree, the first defendant has filed this appeal. Cross-objections have been filed by defendants-3 to 5 and by defendants-2 and 8 separately. The defendants-3 to 5 want 1/8 share to be given to the plaintiff as well as the defendants. Defendant-2 and 8 want a finding that D.2 had separated from 26.4.1967, but the 1st defendant and plaintiff separated in 1973.

13. Learned counsel appearing on behalf of the appellant (Defendant No.1) mainly contended that the burden to prove that the suit properties are joint family properties, is on the person who alleges that it is joint family properties. In support of his contention, the counsel relied upon the judgment of the Supreme Court in the case of BHAGWATI PRASAD SAH AND OTHERS VS. DULHIN RAMESHWARI KUER AND ANOTHER (A.I.R.(39) 1962 SUPREME COURT 72) wherein it has been held that :

"The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved but where one of the coparceners separates himself from the other members of the joint family and has his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which be claimed relief".

He also relied upon another judgment in the case of GUR NARAIN DAS AND ANOTHER VS.TAHAL DAS AND OTHERS (A.I.R.1952 SUPREME COURT 225) wherein it was held that:

"..... though there was no partition by metes and bounds, the two brothers were divided in status and enjoyed the usufruct of the properties according to their respective shares, ... It seems to us that the finding of the High Court as to the separation of the 2 brothers must be upheld."

The counsel submitted that from the evidence on record it is proved that D1 separated himself from the family and was living separate; therefore, it is proved that the properties purchased in his name were his separate properties.
14. Learned counsel for the appellant further submitted that there is no presumption with respect to the business even though the business was carried only any member of the joint family, that it is a joint family business. In support of his arguments, The counsel relied upon the judgment

of the Supreme Court in the case of CHATTANATHA KARAYALAR VS. RAMACHANDRA IYER AND ANOTHER (A.I.R.1955 SUPREME COURT 79 9) wherein it has been held that :

"Under the Hindu law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family, and it makes no difference in this coparceners."
He also relied upon a Division Bench judgment of this Court in the case of PADMINI CHANDRASEKARAN VS. SOMASUNDARAM CHETTIAR AND OTHERS reported in (1965 (2) M.L.J. 65) wherein it has been held that:
"There can be no presumption that a business started and conducted by a junior member of a Hindu joint family, in his own name, is not his separate business but a joint family one. Unless it can be shown that the business in the hands of a coparcener grew up from joint family property or that the earnings were blended with joint family estate, they remain free and separate. The question whether the business was begun or carried on with the assistance of joint family property or as a family business is a question of fact upon which the initial burden of proof lies upon those who claim a share in the business. Under the Hindu Law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is a manager of the family; it would make no difference in this respect even if the manager happens to be the father of the coparceners. "

Placing reliance on the above decisions of the Courts the learned counsel for the appellant has submitted that there can be a division of status among the members of the joint family and the division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. For this, he also relied upon the judgment of the Supreme Court in the case of MST.RUKHMABAI VS. LALA LAXMINARAYAN AND OTHERS (A.I.R.1960 SUPEME COURT,385). Learned counsel for the appellant would submit that in the present case,immediately after the death of his father, he separated himself from the family and therefore, all the acquisitions subsequent to that date in his name is his personal properties.

15. But the contention of the counsel for the appellant is not acceptable as there is no evidence to prove the case of Defendant No.1 that he separated himself from the family after the death of the father.

16. Learned counsel for the appellant next contended that unless there is evidence to show that the ancestral properties yielded income sufficient to constitute joint family nucleus for starting a business, the properties acquired out of the income from such business cannot be considered as a joint family property. In support of this contention, he relied upon the

judgment of the Supreme Court in the case of SRINIVAS KRISHNARAO KANGO VS. NARAYAN DEVJI KANGO AND OTHERS (A.I. R.1954 SUPREME COURT,379). In the present case, the learned counsel submitted that there is no such evidence to prove that the joint family property yielded any income which was sufficient to start a business and therefore, there is no evidence to prove that the properties purchased from and out of the income from the business are joint family properties.

17. Learned counsel for the appellant also relied on the following judgments of this Court.

i)In the case of MANICKAM CHETTY VS. KAMALAM ALIAS KAMALATHAMMAL (193 7 (1) M.L.J. 95) Wherein it has been held that :

"Where before partition a business is carried on by one member with the aid of joint family funds, it may be that the concern belongs to that individual member, his share being debited with the sums employed therefor; but the presumption from that circumstance is that it is a joint family concern."

ii) In the case of S.K.T.SOUNDARARAJALU VS. MINOR SHANMUGAM AND ANOTHER (1942, M.L.J. 184) wherein it has been held as hereunder:

"Where a business was started by the manager of a Hindu joint family which had absolutely no connection with the old business that had been carried on by their father, the fact that the business was of the same nature as the old business, cannot make it an ancestral business at all."

iii) In the case of PARASAM VENKATARAMAYYA VS. PARASAM VENKATARAMAPPA AND OTHERS (1951 M.L.J. 508) wherein it was held :

"If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of contribution from the joint family and goes and starts a business and acquired properties, it is reasonable to extend the principle of Hindu Gains of Learning Act (XXX of 1930) to such a case. There is no real distinction between the cases of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family it should not be held that the business is a family business".

iv) In the case of C.SUNDARAM VS. RUKMANIAMMAL AND OTHERS (1974 M.L. J.354) it has been held as below:

" Where a business was in its origin the exclusive business of the father, whether that business came to acquire a joint family character would depend on the nature of the help or assistance given by the son. It is not every act or work done or assistance given by a son to the father in the conduct of the business that will make the business a joint family business. If the work done or assistance given by the son is such as to lead to the inference that the father had intended to treat his exclusive business as a joint family business, then alone the presumption of joint business could be invoked. In invoking such a presumption the joint exertion by the son with his father should be such that the father could be said to have intended to treat the business as belonging to both, or to the joint family."

18. Learned counsel for the appellant also relied on the judgment of Privy council in the case of MALIK HARKRISHAN SINGH VS. MALIK PARTAP SINGH AND OTHERS) 1936 P.C.189)in which it has been held that there can be partition without actual division of property by metes and bounds.
19. Therefore, the counsel relying on these judgments would submit that the plaintiff has not discharged his burden and proved that the properties are joint family properties. The counsel for the appellant submitted that the income from the property inherited under Ex. A.1 by the father did not yield any income; therefore, there was no joint family nucleus; therefore, the oil business started by the father was not a joint family business. Thereafter, when the first defendant started a business in his own name, it was his separate business. Therefore, the properties purchased from and out of the income from such business in his own name, are his separate properties. Hence, the plaintiff or anybody else has no right whatsoever over those properties.

20.The argument of the counsel for appellant is not acceptable. From the evidence on record it is proved that the father (of the plaintiff and defendants 1 and 2) started business only in the land in item 6 of 'A' schedule which he got in the partition. This was sufficient to constitute the joint family nucleus. The father started his own oil business in the vacant site inherited from the grand father; and that the business was continued till his death in the same place. Therefore, even though there was no suf ficient income generated from the ancestral properties received by the father, yet,since the business was started by him only in the ancestral property it was a joint family business and that business was continued by the first respondent after the death of his father. Admittedly, all the properties except item 6 of 'A' Schedule properties which was inherited by the father under Ex.A.1, were purchased through the income earned in this business. Therefore, the properties are proved to be joint family properties till the death of the father. The plaintiff as P.W.1 has stated in his evidence that he and his brothers were assisting their father in the business. In a trading community like the parties before this Court, it is but usual for all the childr en of that family taking active part in the business carried on by the father; it is seen as if the father alone is carrying on the business and the sons were just assisting more or less as a free employees; in such families, the children will take active part. Therefore, the business carried on by the father was a joint family business and so the plaintiff and the defendants 1 and 2 were members of the joint family business. Though the counsel for the appellant has submitted that there is no presumption in the case of business to be a joint family business even if it is carried on by the manager of the family, yet it is only presumption which is rebuttable. On a perusal of evidence of P.W.1,. D.W.1 and D. W.3, it is clear the first defendant was actively participating in the business run by his father. P.W.1 has also stated that he was also actively participating in the business. Therefore, the business though started by the Kartha of the family, it was carried on as the joint family business. When the first defendant started the business at another place,it was as an expansion of the same business, like starting another branch. If the appellant had started a new business, not connected with that of his family business, different consideration would arise. Starting a branch or additional place of business has to be presumed

as part of the joint family business. Therefore, the properties acquired from and out of the income earned through that business, is in the nature of joint family properties. Therefore, the case of the plaintiff that the properties were joint family properties is prima facie proved. Thus the plaintiff has discharged the initial burden of proving that the properties were joint family properties.

21. The case of the first defendant is that immediately after the death of the father, he separated himself from the family and thereafter he was carrying on the business as his separate business and not as a joint family business. When examined before the Court, he has admitted that after the death of the father, he purchased the properties under items 2 and 3 in the year 1964. Even in the cross examination, he has admitted that only at the end of 1967, the oral partition took place among them. Therefore, even D.1 admits that the family was joint till 1967. That is, it is the admitted case of the first defendant that the family continued as joint family till the end of 1967 and only at the end of 1967, the oral partition of joint family properties took place.

22. Though, the first defendant had stated that there was an oral partition in the year 1967, none of the other members of the family admits the oral partition. There is evidence only to show that the house in which they are residing, was partitioned. According to the tradition and custom, the eldest member of the family was given the western most portion of the house and the youngest member was given the eastern portion and the first defendant was given the middle portion. Apart from that, there is no evidence with respect to partition of any other properties. Though D.W.1 says that oral partition was made in the presence of panchayatdars and some of the names of panchayatdars were also mentioned, only one of them has been examined as D.W.2, who admits that no Muchilika was signed in the panchayat. Further, D.W.2 says that he does not know the details of the properties possessed by the family. Also, he is not able to say what are the properties allotted to each member of the family. Therefore, his evidence is not sufficient to prove the oral partition pleaded by the first defendant. There is absolutely no evidence to prove the oral partition in the year 1967 as claimed by D.W.1. From the evidence on record, it is seen that the first defendant has not proved his case that there was an oral partition in the year 1967. Therefore,the lower Court was right in rejecting the claim of D.W.1 regarding the oral partition in the year 1967. In the circumstances, subsequent to the death of the father, there was no partition of the joint family properties and it follows that all the properties continued to be joint family properties.
23.As per law, when the head of the family dies,the properties of joint family devolves upon his heirs and if the heirs include a female, there is a deemed partition on the date of death of the head of the family. Therefore, with respect of female heir , there is deemed partition on the date of death of the father. Therefore, in any acquisition made subsequent to the death of the father, even though the other male members (coparceners) continue to have the status of members of Hindu Joint family, the female heirs will not be entitled to claim any right in the properties purchased after the death of the father. Hence, the other properties acquired subsequent to the death of

the father will not devolve upon the female heirs of the father. Therefore, all such properties which were acquired by the other coparceners are partible properties among the plaintiff D1 and D2. A wall on the northern side of item 2 of the suit properties was purchased by the first defendant on 30.6.1966 under Ex.B.27. Both the plaintiff and the defendants admit that they are separated in the year 1971 and therefore, in as much as this property purchased in the year 1969 has to be construed as a joint family property. Even though the first defendant has let in evidence to prove that he has borrowed money from various persons which was also proved by documents filed by him, that has to be construed only as the property purchased on behalf of the joint family and the case of the first defendant that it is not a joint family property, is not acceptable.

24. The property in Item No.3 was purchased under Ex.B.35 on 2.8.19 65 and therefore, for the reasons stated above, it is also a joint family property purchased on behalf of joint family. The lower Court has rightly decided the issue against the defendant.

25. With respect to item Nos. 9 to 11,the properties were purchased through Court auction in execution proceedings by the first defendant on 24.5.1963. Though the properties were purchased in Court Auction by D.W.1, it was only from the income of the joint family business; at that time he was not separated from joint family and therefore, it has to be construed that it was purchased on behalf of the joint family. Therefore,the properties under item Nos.9 to 11 were also joint family properties and the lower court has rightly held that it is also available for partition.

26. With respect to the properties under item Nos.21 to 24, they were purchased by the father of the plaintiff during his lifetime and given to him. However, the first defendant claims it as his own; he has filed only pattas to prove his case. It is settled law that pattas are not the documents of title and merely because the patta stands in the name of one of the family members of the joint family, it cannot be said that it exclusively belongs to that member. In the absence of any document conveying the properties in favour of the first defendant, it has to be construed as joint family properties, since those properties are immovable properties, they can either be settled or gifted only through a registered document . No such documents have been filed by the first defendant to prove his case. Therefore, the defendant failed to prove his case that the properties in item nos. 21 to 24 were given to him by the father and therefore, they are his separate properties. The lower Court also has rightly held that they are not separate properties of the first defendant but are joint family properties.
27. With respect to the property in Item No.28: it was purchased by the father in the year 1956. Therefore it is a joint family property. Merely because, the second defendant had got an assignment of 1/3 rd of the property, it does not seize to be the joint family property. There is no evidence to hold that Defendant No.2 had separated in the year 1967. Therefore, that item also partible property. The lower court has rightly held that all the properties are liable for partition.

28. The lower Court has rightly decided the issue and decreed

the suit as prayed for. There is no illegality or irregularity committed by the trial Court requiring any modification. Hence, the judgment and decree of the trial Court is hereby confirmed.

29. In the result, the Appeal is dismissed. No costs. The two Cross-Objections are also dismissed.

Index: Yes
Web Site: Yes
pa/vs

To:
1. The Subordinate Judge,
Ramanathapuram at Madurai.

JUDGMENT
IN
APPEAL SUIT NO.1061 OF 1986
AND
TWO CROSS OBJECTIONS